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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/552,044	04/19/2000	Hans-Ulrich Buschhaus	Mo-5586-LeA 33,605	3337

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10/31/2002

Patent Department  
Bayer Corporation  
100 Bayer Road  
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EXAMINER

REDDICK, MARIE L

ART UNIT

PAPER NUMBER

1713

DATE MAILED: 10/31/2002

14

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application N .

09/552,044

Examiner

Judy M. Reddick

Applicant(s)

BUSCHHAUS ET AL.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 August 2002.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 31-39 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 31-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

**Claim Rejections - 35 USC § 112**

1. **The following is a quotation of the second paragraph of 35 U.S.C. 112:**

***The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.***

2. **Claims 31-39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.**

A) **In claim 31 @ line 6, claim 35 @ line 5, claim 37 @ line 7, claim 39 @ line 8, it is suggested that applicant insert the indefinite article "a" before "halogen" so as to engender claim language clarity.**

B) **The recited "acrylate dispersions" per claims 31, 35, 37 and 39 constitute indefinite subject matter as per the metes and bounds of such engender an indeterminacy in scope, i.e., it is not readily ascertainable if resins, monomers or other <sup>are</sup> intended.**

**Response to Amendment**

3. **After further consideration coupled with Counsel's persuasive arguments, the rejection based on Metzner et al is herein withdrawn.**

**Claim Rejections - 35 USC § 102**

4. **The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:**

**A person shall be entitled to a patent unless –**

**(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.**

**The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was**

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*not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b).*

*Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).*

5. *The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:*

*(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.*

6. *Claims 31-39 stand rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Ludwig et al as per reasons of record per paper no. 11, 01/29/02.*

**Claim Rejections - 35 USC § 102**

7. *The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:*

*A person shall be entitled to a patent unless –*

*(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.*

8. *The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:*

*(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.*

9. *Claims 31-39 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Eversole(U.S. 3,113,399).*

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***Eversole et al* disclose and exemplify aqueous protective coatings for seeds, against fungi, disease and insects, wherein, said coating compositions are defined basically as containing a paint vehicle which includes acrylic resins, alkyd resins, in particular 23 % penta soya oil alkyd resin(BB-6-60), water, nutrients, fungicides, emulsifiers, etc. See, e.g., cols. 1 and 3. More specifically, Eversole et al exemplify aqueous seed coating compositions containing, basically, water, as a paint vehicle, maleic anhydride modified drying oil, Captan(fungicide) emulsifier(Triton X-100) and other conventional adjutants. See Run II. Therefore, Eversole et al anticipate the instantly claimed invention with the understanding that one of ordinary skill in the art would have readily envisioned the use of the oil-modified alkyd resin used in Run VII in lieu of the maleic anhydride modified drying oil since they are taught as operable equivalents at col. 3, lines 24-42. It is the base presumption that the aforementioned alkyd resin may very well possess the claimed pH value since it is essentially the same as the claimed binder component and in the absence of the USPTO having at its disposal the tools deemed necessary to make physical determinations of this sort.**

***The introductory phrases "A method for protecting" and "A method for stabilizing" per claims 35 and 37 do not serve to patentably distinguish the claim method from the system of Eversole et al. While Eversole et al may not show a specific recognition of these results, the discovery by applicant is tantamount only to finding a property of an old composition. Such recognition does not impart patentability to an otherwise old composition as provided for under the auspices of In re Tomlinson et al(150 USPQ 623).***

#### **Response to Arguments**

10. ***Applicant's arguments filed 08/06/02 have been fully considered but they are not persuasive.***

***Relative to Ludwig et al—The crux of Counsel's arguments appears to hinge on the additional compounds attached to the composition of Ludwig et al. To this end, the claims, in their present form, simply don't preclude those azol fungicide and quaternary***

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*ammonium compounds housed in the composition of Ludwig et al. Further, Counsel is reminded that a reference is evaluated, as a whole, for what it fairly teaches and, to this end, is in no way limited to the working Runs.*

**Conclusion**

**11. Note the attached FORM PTO-892 for additional prior art cited as of interest in teaching compositions, similar to the claimed compositions, and considered merely cumulative to the prior art supra.**

**Any inquiry concerning this communication or earlier communications from the examiner should be directed to Judy M. Reddick whose telephone number is (703)308-4346. The examiner can normally be reached on Monday-Friday, 6:30 a.m.-3:00 p.m..**

**If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Wu can be reached on (703)308-2450. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)892-9311 for After Final communications.**

**Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703)305-8183.**

*J. M. Reddick*  
**Judy M. Reddick  
Primary Examiner  
Art Unit 1713**

**JMR** *JMR*  
**October 28, 2002**